

ASSEMBLY BILL

No. 1329

Introduced by Assembly Member Wolk

February 22, 2005

An act to add Section 20133.6 to the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 1329, as introduced, Wolk. Design-build contracting: cities.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law, until January 1, 2006, permits certain counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified provisions.

This bill would permit any city, with the approval of the city council, to enter into design-build contracts, as defined, in accordance with specified provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 20133.6 is added to the Public Contract
- 2 Code, to read:
- 3 20133.6. (a) (1) This section provides for an alternative
- 4 procedure on bidding on building construction projects
- 5 applicable in cities upon approval of the appropriate city council.

1 (2) The cities may award the project using either the lowest
2 responsible bidder or by best value.

3 (b) (1) It is the intent of the Legislature to enable cities to
4 utilize cost-effective options for building and modernizing public
5 facilities. The Legislature also recognizes the national trend,
6 including authorization in California, to allow public entities to
7 utilize design-build contracts as a project delivery method.

8 (2) The Legislature also finds and declares that utilizing a
9 design-build contract requires a clear understanding of the roles
10 and responsibilities of each participant in the design-build
11 process. The benefits of a design-build contract project delivery
12 system include an accelerated completion of the projects, cost
13 containment, reduction of construction complexity, and reduced
14 exposure to risk for the city. The Legislature also finds that the
15 cost-effective benefits to cities are achieved by shifting the
16 liability and risk for cost containment and project completion to
17 the design-build entity.

18 (3) It is the intent of the Legislature to provide an alternative
19 and optional procedure for bidding and building construction
20 projects for cities.

21 (4) The design-build approach may be used, but is not limited
22 to use, when it is anticipated that it will: reduce project cost,
23 expedite project completion, or provide design features not
24 achievable through the design-bid-build method.

25 (5) If a city council elects to proceed under this section, the
26 city council shall establish and enforce for design-build projects
27 a labor compliance program containing the requirements outlined
28 in Section 1771.5 of the Labor Code, or it shall contract with a
29 third party to operate a labor compliance program containing the
30 requirements outlined in Section 1771.5 of the Labor Code. This
31 requirement shall not apply to any project where the city or the
32 design-build entity has entered into any collective bargaining
33 agreement or agreements that bind all of the contractors
34 performing work on the projects.

35 (c) As used in this section:

36 (1) "Best value" means a value determined by objective
37 criteria and may include, but is not limited to, price, features,
38 functions, life-cycle costs, and other criteria deemed appropriate
39 by the city.

1 (2) “Design–build” means a procurement process in which
2 both the design and construction of a project are procured from a
3 single entity.

4 (3) “Design–build entity” means a partnership, corporation, or
5 other legal entity that is able to provide appropriately licensed
6 contracting, architectural, and engineering services as needed
7 pursuant to a design–build contract.

8 (d) Design–build projects shall progress in a four–step
9 process, as follows:

10 (1) (A) The city shall prepare a set of documents setting forth
11 the scope of the project. The documents may include, but are not
12 limited to, the size, type, and desired design character of the
13 buildings and site, performance specifications covering the
14 quality of materials, equipment, and workmanship, preliminary
15 plans or building layouts, or any other information deemed
16 necessary to describe adequately the city’s needs. The
17 performance specifications and any plans shall be prepared by a
18 design professional who is duly licensed and registered in
19 California.

20 (B) Any architect or engineer retained by the city to assist in
21 the development of the project specific documents shall not be
22 eligible to participate in the preparation of a bid with any
23 design–build entity for that project.

24 (2) (A) Based on the documents prepared in paragraph (1), the
25 city shall prepare a request for proposals that invites interested
26 parties to submit competitive sealed proposals in the manner
27 prescribed by the city. The request for proposals shall include,
28 but is not limited to, the following elements:

29 (i) Identification of the basic scope and needs of the project or
30 contract, the expected cost range, and other information deemed
31 necessary by the city to inform interested parties of the
32 contracting opportunity, to include the methodology that will be
33 used by the city to evaluate proposals and specifically if the
34 contract will be awarded to the lowest responsible bidder.

35 (ii) Significant factors which the city reasonably expects to
36 consider in evaluating proposals, including cost or price and all
37 nonprice related factors.

38 (iii) The relative importance of weight assigned to each of the
39 factors identified in the request for proposals.

1 (B) With respect to clause (iii) of subparagraph (A), if a
2 nonweighted system is used, the agency shall specifically
3 disclose whether all evaluation factors other than cost or price
4 when combined are:

5 (i) Significantly more important than cost or price.

6 (ii) Approximately equal in importance to cost or price.

7 (iii) Significantly less important than cost or price.

8 (C) If the city chooses to reserve the right to hold discussions
9 or negotiations with responsive bidders, it shall so specify in the
10 request for proposal and shall publish separately or incorporate
11 into the request for proposal applicable rules and procedures to
12 be observed by the city to ensure that any discussions or
13 negotiations are conducted in good faith.

14 (3) (A) The city shall establish a procedure to prequalify
15 design-build entities using a standard questionnaire developed by
16 the city. In preparing the questionnaire, the city shall consult with
17 the construction industry, including representatives of the
18 building trades and surety industry. This questionnaire shall
19 require information including, but not limited to, all of the
20 following:

21 (i) If the design-build entity is a partnership, limited
22 partnership, or other association, a listing of all of the partners,
23 general partners, or association members known at the time of
24 bid submission who will participate in the design-build contract,
25 including, but not limited to, mechanical subcontractors.

26 (ii) Evidence that the members of the design-build entity have
27 completed, or demonstrated the experience, competency,
28 capability, and capacity to complete projects of similar size,
29 scope, or complexity, and that proposed key personnel have
30 sufficient experience and training to competently manage and
31 complete the design and construction of the project, as well as a
32 financial statement that assures the city that the design-build
33 entity has the capacity to complete the project.

34 (iii) The licenses, registration, and credentials required to
35 design and construct the project, including information on the
36 revocation or suspension of any license, credential, or
37 registration.

38 (iv) Evidence that establishes that the design-build entity has
39 the capacity to obtain all required payment and performance
40 bonding, liability insurance, and errors and omissions insurance.

1 (v) Any prior serious or willful violation of the California
2 Occupational Safety and Health Act of 1973, contained in Part 1
3 (commencing with Section 6300) of Division 5 of the Labor
4 Code or the federal Occupational Safety and Health Act of 1970
5 (Public Law 91-596), settled against any member of the
6 design-build entity, and information concerning workers'
7 compensation experience history and worker safety program.

8 (vi) Information concerning any debarment, disqualification,
9 or removal from a federal, state, or local government public
10 works project. Any instance where an entity, its owners, officers,
11 or managing employees submitted a bid on a public works
12 project and were found to be nonresponsive, or were found by an
13 awarding body not to be a responsible bidder.

14 (vii) Any instance where the entity, its owner, officers, or
15 managing employees defaulted on a construction contract.

16 (viii) Any violations of the Contractors' State License Law
17 (Chapter 9 (commencing with Section 7000) of Division 3 of the
18 Business and Professions Code), excluding alleged violations of
19 federal or state law including the payment of wages, benefits,
20 apprenticeship requirements, or personal income tax withholding,
21 or of Federal Insurance Contribution Act (FICA) withholding
22 requirements settled against any member of the design-build
23 entity.

24 (ix) Information concerning the bankruptcy or receivership of
25 any member of the design-build entity, including information
26 concerning any work completed by a surety.

27 (x) Information concerning all settled adverse claims, disputes,
28 or lawsuits between the owner of a public works project and any
29 member of the design-build entity during the five years
30 preceding submission of a bid pursuant to this section, in which
31 the claim, settlement, or judgment exceeds fifty thousand dollars
32 (\$50,000). Information shall also be provided concerning any
33 work completed by a surety during this period.

34 (xi) In the case of a partnership or other association, that is not
35 a legal entity, a copy of the agreement creating the partnership or
36 association and specifying that all partners or association
37 members agree to be fully liable for the performance under the
38 design-build contract.

39 (B) The information required pursuant to this subdivision shall
40 be verified under oath by the entity and its members in the

manner in which civil pleadings in civil actions are verified. Information that is not a public record pursuant to the California Public Records Act (Chapter 3.5 of Division 7 of Title 1 of the Government Code) shall not be open to public inspection.

(4) The city shall establish a procedure for final selection of the design-build entity. Selection shall be based on either of the following criteria:

(A) A competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

(B) The city may use a design-build competition based upon best value and other criteria set forth in paragraph (2) of subdivision (d). The design-build competition shall include the following elements:

(i) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposal. However, the following minimum factors shall collectively represent at least 50 percent of the total weight of consideration given to all criteria factors; price, technical design and construction expertise, life cycle costs over 15 years or more, skilled labor force availability, and acceptable safety record.

(ii) Once the evaluation is complete, the top three responsive bidders shall be ranked sequentially from the most advantageous to the least.

(iii) The award of the contract shall be made to the responsible bidder whose proposal is determined, in writing, to be the most advantageous.

(iv) Notwithstanding any provision of this code, upon issuance of a contract award, the city shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the city's second and third ranked design-build entities.

(v) For the purposes of this paragraph, "skilled labor force availability" shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, which has graduated apprentices in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship

1 training for any craft that has been deemed by the Department of
2 Labor and the Department of Industrial Relations to be an
3 apprenticeable craft in the five years prior to enactment of this
4 act.

5 (vi) For the purposes of this paragraph, a bidder's "safety
6 record" shall be deemed "acceptable" if their experience
7 modification rate for the most recent three-year period is an
8 average of 1.00 or less, and their average Total Recordable
9 Injury/Illness rate and average lost work rate for the most recent
10 three-year period does not exceed the applicable statistical
11 standards for its business category or if the bidder is a party to an
12 alternative dispute resolution system as provided for in Section
13 3201.5 of the Labor Code.

14 (e) (1) Any design-build entity that is selected to design and
15 build a project pursuant to this section shall possess or obtain
16 sufficient bonding to cover the contract amount for nondesign
17 services, and errors and omission insurance coverage sufficient to
18 cover all design and architectural services provided in the
19 contract. This section does not prohibit a general or engineering
20 contractor from being designated the lead entity on a
21 design-build entity for the purposes of purchasing necessary
22 bonding to cover the activities of the design-build entity.

23 (2) Any payment or performance bond written for the
24 purposes of this section shall be written using a bond form
25 developed by the city.

26 (f) All subcontractors that were not listed by the design-build
27 entity in accordance with clause (i) of subparagraph (A) of
28 paragraph (3) of subdivision (d) shall be awarded by the
29 design-build entity in accordance with the design-build process
30 set forth by the city in the design-build package. All
31 subcontractors bidding on contracts pursuant to this section shall
32 be afforded the protections contained in Chapter 4 (commencing
33 with Section 4100) of Part 1. The design-build entity shall do
34 both of the following:

35 (1) Provide public notice of the availability of work to be
36 subcontracted in accordance with the publication requirements
37 applicable to the competitive bidding process of the city.

38 (2) Provide a fixed date and time on which the subcontracted
39 work will be awarded in accordance with the procedure
40 established pursuant to this section.

1 (g) The minimum performance criteria and design standards
2 established pursuant to paragraph (1) of subdivision (d) shall be
3 adhered to by the design-build entity. Any deviations from those
4 standards may only be allowed by written consent of the city.

5 (h) The city may retain the services of a design professional or
6 construction project manager, or both, throughout the course of
7 the project in order to ensure compliance with this section.

8 (i) Contracts awarded pursuant to this section shall be valid
9 until the project is completed.

10 (j) Nothing in this section is intended to affect, expand, alter,
11 or limit any rights or remedies otherwise available at law.

12 (k) (1) If the city elects to award a project pursuant to this
13 section retention proceeds withheld by the city from the
14 design-build entity shall not exceed 5 percent if a performance
15 and payment bond, issued by an admitted surety insurer, is
16 required in the solicitation of bids.

17 (2) In a contract between the design-build entity and the
18 subcontractor, and in a contract between a subcontractor and any
19 subcontractor thereunder, the percentage of the retention
20 proceeds withheld may not exceed the percentage specified in the
21 contract between the city and the design-build entity. If the
22 design-build entity provides written notice to any subcontractor
23 who is not a member of the design-build entity, prior to or at the
24 time the bid is requested, that a bond may be required and the
25 subcontractor subsequently is unable or refuses to furnish a bond
26 to the design-build entity, then the design-build entity may
27 withhold retention proceeds in excess of the percentage specified
28 in the contract between the city and the design-build entity from
29 any payment made by the design-build entity to the
30 subcontractor.